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# A Critical Analysis of Scholarship Concerning Sir John Fortescue (C1934-1476)

Ronald Joseph Malecki  
*Loyola University Chicago*

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**A CRITICAL ANALYSIS OF SCHOLARSHIP CONCERNING  
SIR JOHN FORTESCUE (c1394 - 1476)**

**by**

**Ronald Malecki**

**A Thesis Submitted to the Faculty of the Graduate School  
of Loyola University in Partial Fulfillment of  
the Requirements for the Degree of  
Master of Arts**

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## **LIFE**

**Ronald Joseph Malecki was born in Chicago, Illinois, on March 10, 1929.**

**He was graduated from St. Mel's High School, Chicago, Illinois, June, 1947, and from De Paul University, June, 1951, with the degree of Bachelor of Arts.**

**From September, 1955, to June, 1956, the author taught English at Liberty-Eylau High School, Texarkana, Texas. He began his graduate studies at Loyola University in September, 1951.**

## **PREFACE**

The original plan called for a summary of the political theory of Sir John Fortescue. Since the project has already been treated by several eminent historians, it was abandoned in favor of a more limited subject. The present subject was chosen in order to crystallize the various views presented by these authors.

Very special thanks are due to Father John Kemp, S.J., and Doctor Paul Lietz for their kindness and helpfulness.

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## CHAPTER 1

### INTRODUCTION

Of the many centuries studied by the student of history, one of the most interesting is the fifteenth. In this century of political transition many of the institutions of the medieval period are either destroyed or else in the process of decay. Nevertheless, there are many in this century who cling tenaciously to medieval tradition making the period appear stagnant, belying the strong undercurrent of political change.

Unfortunately, the twentieth century student has been exposed to many mistaken ideas concerning this vital period. Continuous examination has nonetheless dispelled many of the vagaries connected with it. New research is constantly uncovering facts which make the evaluation of material an almost continual process. The subject of this paper, the opinions of Sir John Fortescue, have undergone a radical revision in the last twenty years. The writings of this fifteenth century English lawyer are now being re-examined in an effort to present a new evaluation of their various constitutional implications for the period in which he wrote.

This paper is an effort to present current thought concerning Fortescue. This is necessary because of the extremely

"whiggish" attitude of many of the nineteenth century historians. The whig historians read into this fifteenth century writer their own nineteenth century liberal ideas. In his Whig Interpretation of History, Herbert Butterfield relates how "some English historians began to favor one side against the other, praise revolutions providing they had been successful, emphasize certain principles of progress in the past and produce a story which was the ratification of the present."<sup>1</sup> During the nineteenth and even the early twentieth century various historians writing in this whig tradition tended to give undue praise to Sir John Fortescue and attribute to him ideas of later constitutional monarchy, which basically were not his.<sup>2</sup> They praise Fortescue in terms of this whiggish tradition but frequently fail to consider the times in which he wrote. They failed to realize that Fortescue, though faced with a changing political structure, was essentially a medievalist writing about a medieval concept of kingship. He could never be treated as a nineteenth century liberal.

This paper is an attempt to trace these various concepts and show how twentieth century historians have sought to study Fortescue in his proper setting. An examination will be made of

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1 Herbert Butterfield, Whig Interpretation of History, (London, 1931), v.

2 Sir John Fortescue, The Governance of England, ed. C. Plummer, (Oxford, 1885), 8. Hereinafter cited as Governance, Plummer. Sir John Fortescue, Works of Sir John Fortescue, ed. Lord Clermont, 1, (London, 1869), 360. Hereinafter cited as Clermont.

several of their writings in an effort to give their estimate of Fortescue and how they came to their evaluation.

Primarily, this paper covers opinions from 1869 to the present; however, a brief listing of earlier publications is given in Chapter II. The year 1869 is of importance because of the appearance that year of a two-volume work edited by Thomas Lord Clermont<sup>3</sup>, a descendant of Sir John Fortescue. This is the first really complete work on his life and writings.

However, before proceeding with the project suggested, it may be to our advantage to examine Sir John's life, his writings and the period in which he wrote. Only in this manner can something of a complete picture be obtained.

Sir John Fortescue was born about 1394, probably at Norris, near South Brent in Devonshire. He died sometime after 1476 at Ebrington, where he is buried in the parish churchyard. His life covered the entire Lancastrian regime and in general most of the fifteenth century.<sup>4</sup>

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<sup>3</sup> J. M. Rigg, "Thomas Clermont (Fortescue)", Dictionary of National Biography (London, 1908), VII, 488-490. Hereinafter cited as D.N.B.

<sup>4</sup> Sir John Fortescue was educated at Exeter College, Oxford, and studied at Lincoln's Inn. He was made a Governor of Lincoln's Inn in 1425, 1426 and 1429, and a Sergeant in 1430. He married in 1435 or early in 1436 and acted as Judge of Assize in Norfolk in 1440 and 1441. He was made a Chief Justice in 1442 and knighted soon afterwards. He fled with Henry VI in 1461 to Scotland and then to France, where he acted as ambassador to Louis XI. He was appointed Lord Chancellor by the exiled Henry about this time. He returned with the Lancaster in 1470 but with Henry's de-



The fifteenth century is one of many facets and Stanley B. Chrimes, a contemporary English historian, points out that it is noted for "its conservatism, its lack of originality, its old-fashionedness", but at the same time he notes there was manifest a "change in subject matter, for political thought was becoming less exclusively a theory of monarchy and more a theory of state".<sup>5</sup>

More conservatively, William Stubbs, the noted nineteenth century English constitutional historian, maintained that the fifteenth century was not a period of constitutional development and that parliament did not assume any new powers. "Its special history is either a monotonous detail of formal proceedings, or a record of asserted privilege."<sup>6</sup>

Henry IV, (1399-1413), had received the crown by right of conquest, inheritance and popular election, but the last was the most important. The elective position of the Lancasters appears to be their only valid claim to the crown and this position established a tradition which colored the history of the next sixty years.

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feast at Tewkesbury on May 4, 1471, he was taken captive and spared by Edward IV. His confiscated estates were returned to him after he refuted his former arguments against the Yorkist claims. Clermont, I, 3-52. D.N.B., VII, 482-485. Edward Foss, Lives of English Judges, (London, 1870), 276-78.

5 Stanley B. Chrimes, "Sir John Fortescue and His Theory of Dominion", Royal Historical Society Transactions, XVII, (London, 1934), 118. Hereinafter cited as Chrimes, Dominion.

6 William Stubbs, Constitutional History of England, III, (London, 1891). 2.

The fourteenth century saw the incorporation of the Commons in parliament and the fifteenth century saw the forms and traditions of parliament, and especially of the Commons, established.<sup>7</sup> Henry IV, in spite of troubles, stood by the constitutional compromise and maintained the constitutional balance. Henry V acted in close harmony with his parliament and due to victorious wars, made the Lancastrian house strong and made England the first power in Europe.<sup>8</sup> Parliament, during his reign, made no progress but it lost no ground.

Henry V died in 1422, worn out by incessant campaigning. His heir was not yet a year old and as a result there was a constant struggle for power. Henry VI's reign can be divided into three main periods, (1) the minority (1422-1437), when Beaufort and Gloucester waged their struggle for supremacy; (2) Henry's own attempt at governing (1437-1450), aided by those who from time to time had ascendancy with him; and (3) from Cade's rising (1450) to the civil war (1461).<sup>9</sup> Plummer had pointed out how weak and poor the crown was during most of Henry VI's reign, due to the unstable internal conditions and the bad and numerous loans and grants of annuities and pensions to persons actually much richer than the

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7 Helen Cam, England Before Elizabeth, (Watford, 1950), 133.

8 Stubbs, II, 74.

9 Governance, Plummer, 8.

crown. In an effort to remedy the situation, Fortescue proposed an increase in the permanent endowments of the crown and a limitation on the king's power to grant pensions and annuities by making the council's consent necessary; he also advocated a system of ready money payments, whereby a saving of twenty or twenty-five percent on the ordinary expenditures might be effected.<sup>10</sup> Fortescue spoke of the insubordination and wealth of the nobles and of the corruption of the courts and judges. He favored wresting from the nobles the revenues of the crown by an act of resumption and by allowing the king to appoint local officers. He then sought to eliminate the influence of the nobles from the Privy Council, reducing that body to a purely official status with power completely in the crown.<sup>11</sup>

Finally in 1461, after a badly managed reign, Henry VI was forced to leave England and the House of York with Edward IV came to the throne. Plummer pointed out there was no justification on constitutional grounds for the Yorkist claims to the crown and even acceptance by Parliament was not strong enough to set aside the right of the House of Lancaster, which rested on prescription. He inclines to say also that the change was made possible by the "badness of the Lancastrian rule rather than the good-

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10 Ibid., 153-156.

11 Ibid., Chap. XVII.

ness of the Yorkist pedigree".<sup>12</sup> Henry VI was returned to power briefly in 1470 only to fall again. In 1471 he died. Fortescue in the end managed to return to the good graces of the Yorkist rulers, in which he remained to his death.

Plummer divided the works of Fortescue into three divisions: (1) works on the dynastic question of the rival claims to the Houses of Lancaster and York; (2) miscellaneous writings;<sup>13</sup> and (3) constitutional treatises.

As to the succession, it is sufficient to state that Fortescue wrote strongly in favor of the Lancastrians. However, after 1471, with Henry and his heir dead, there was no reason to carry on the struggle and he sought reconciliation. He wrote his tract entitled, The Declaration made by Sir John Fortescue, knight, upon certain writings sent out of Scotland, against the King's title to the Realm of England, in which he stated that he examined documents and historical writings to which he had no access while in exile and he retracted his writings directed against the House of York. Fortescue had adhered to the House of Lancaster until it had no true representative; therefore, he could not be charged with inconsistency.<sup>14</sup>

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12 Ibid., 34.

13 Ibid., 74.

14 Sir John Fortescue, De Laudibus Legum Angliae, ed. A. Amos, (Cincinnati, 1874), ii-iiii. Hereinafter cited as De Laudibus, ed. A. Amos.

As to Fortescue's miscellaneous writings, it can be stated that they are of little importance and the majority of them are of questionable authorship,<sup>15</sup> deserving little place in a discussion of his political thought. A list of these works can be found in Plummer and Lord Clermont.<sup>16</sup>

As far as this study is concerned, the constitutional treatises are the most important. The earliest of these treatises, De Natura Legis Naturae, was written sometime between 1461-63. The only available translation into English is Lord Clermont's work of two volumes published in 1869. The De Natura is divided into two parts. In the first part Fortescue discusses the origin and nature of monarchy and the law of nature which determines the rightful succession to kingdoms. The second part of the work deals with the question of succession, which receives excellent treatment from E. F. Jacobs in his work, Sir John Fortescue and the Law of Nature, (Manchester, 1934).

The first section of the De Natura sets down Fortescue's political theory, his ideas on the origins and various kinds of governments, namely, the Dominium Regale, or absolute monarchy; the Dominium Politicum, or republican government, and the Dominium Politicum et Regale, which is the constitutional or limited monarchy. He draws heavily on the medieval theory of dominion which

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15 Governance, Plummer, 74.

16 Ibid., 74-82. Clermont, I, 555-556.

maintained the pre-ordained relationship of superior to inferior, as the relationship of lord to lord developed out of the feudal system.<sup>17</sup> Because of his notion of dominion, Fortescue is essentially discussing a theory of lordship, not of state, and because of such a position he reflects the general line of medieval thinking.<sup>18</sup>

In the Dominium Regale, or absolute monarchy, the king rules without the consent of the people. He rules by the laws he makes, though he is bound to respect customs and laws established by his predecessors. He is absolute, but within a limited sphere. However, this absolutism is not to be confused with arbitrary rule, for legally the medieval king was not an arbitrary ruler.

Dominium Politicum, or republican government, is given brief treatment in terms of Rome under the consuls. In this form of government the laws are instituted by the people and the authority is usually in the hands of more than one in number.

His major problem is the controversial constitutional monarchy which he discusses under the title Dominium Politicum et Regale. In this form of government the king rules with the consent of the people. Their consent is needed regarding all matters of taxes and laws; and as an example Fortescue cites the Roman emperors who ruled with the consent of the people subject to them. Yet, as Sir John contends, even in a limited monarchy the king must

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17 Chrimes, Dominion, 128.

18 Ibid., 130.

have some absolute powers, because all cases cannot be solved by statute and custom.

Portescue believes that he found this limited monarchy existing in England. There, he argues, the consent of the three estates is necessary in law and that judges cannot go against the laws of the land, even at royal command.<sup>19</sup> Now both the absolute and limited monarchy can be traced to God. They have equal power but differ in the manner in which authority is received. All authority originates in the natural law, which comes from God, and all kingly rights are directly derived from this.<sup>20</sup> In absolute monarchy the king is regal by force and might, while the limited monarchy has its authority from the very union of the king with the community. But in any case there had to be a king, "For just as the natural body without a head was a mere trunk, so in political life a community could not be incorporated without a head to govern it."<sup>21</sup> This he justifies in an appeal to Aristotle's theory that man is a social and political being and St. Thomas Aquinas insists that "common natural rule is by one."<sup>22</sup>

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19 Miss A. E. Levett, Social and Political Ideas of Some Great Thinkers of the Renaissance and Reformation, ed. Hearnshaw, (N.Y., 1949), 69.

20 Chrimes, Dominion, 134.

21 Ibid., 135.

22 St. Thomas Aquinas, De Regimine Principum, (Rome, 1948), 18-19.

Fortescue's limited monarchy is a curious blend of medieval and modern thought. Though the king had to rule by the law he also had an emergency power, "in case of rebellion for the good of the people." This emergency power seems to be related to the old Roman idea of publica utilitas and necessitas regni, in which the king had the right to exercise for the common good a superior jurisdiction in cases of extreme trial. This emergency power found increasing favor among the jurists of the fourteenth and fifteenth centuries, and reflected a growth of the idea of public right and state sovereignty, based on Roman law, as a means of dominating private or feudal rights.

Underlying Fortescue's political ideas is a strong sense of the law of nature. He states that before our Lord gave Moses the laws on Mount Sinai, the law of nature governed the world and this law was superior to customs and statutes. Many kings were created by the law of nature alone.<sup>23</sup> In the De Natura he traces the history of the kings of England, the three basic forms of government, the divine creation of the law of nature as found in St. Thomas' De Regimine Principum<sup>24</sup> and he concludes that judges must

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23 Clermont, I, 193-95.

24 Charles H. McIlwain, Growth of Political Thought in the West, (New York, 1932), 359. St. Thomas Aquinas wrote the first two books of the De Regimine, with Ptolemy of Lucca generally accredited as his continuator.



know the natural law to give true justice.<sup>25</sup> He holds too that the purpose of the law of nature is to bring man to virtue, and that the divine law intends the consummation of all in God.<sup>26</sup>

Among the commentators there is great difference of opinion regarding the De Natura. Plummer contends that it is unreadable and the least important of Fortescue's works, while Chrimes, on the other hand, maintains that it is the most important and well thought out of Fortescue's theoretical compositions and by far his most scholarly works. Because copies of the De Natura are so scarce (only 120 copies of Clermont's 1869 edition were printed) it has often been neglected by historians, but in Chrimes' estimation it contains the essence of Fortescue's political position.<sup>27</sup>

The De Natura shows that Fortescue conceives of kingship as a public office and as a piece of real property, but where he is unclear is on the question of succession. Fortescue realized the inadequacy of the ordinary English private and public law to determine this question and he saw the absolute need of some other constitutional norm on the matter.

The second of Fortescue's important constitutional treatises, De Laudibus Legum Angliae, was written between 1468-70. This work is an elaboration of Fortescue's theory stated in the De

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25 Ibid., 246.

26 Clermont, I, 243-45.

27 Chrimes, Dominion, 124.

Natura. In the De Laudibus he defends his concept of English law against the Roman Civil Law. The De Laudibus follows the form of a dialogue between an aged Chancellor (Fortescue) and a young prince (Edward, Prince of Wales). It is a treatise on the duties and office of a prince, topics which later on receive a vastly different treatment in Machiavelli's Prince and James I's Basilicon Doron.<sup>28</sup>

The Chancellor begins by quoting the Book of Deuteronomy, which governed the people of Israel, and tells the prince to study thoroughly the laws of his people. Though the Book of Deuteronomy was of divine origin, the Chancellor maintains that even human laws are also divine, because these human laws produce justice, which is the main obligation of royal care.<sup>29</sup> The Chancellor repeats the three theories of government and states that the King of England cannot, at his pleasure, make any alterations in the laws of the land for his government is not only regal but political (Dominium Political et Regale).<sup>30</sup> If it were only regal the king could impose whatever laws he wished, which was what the lawyers trained in the Roman tradition argued when they appealed to the axiom "Quod principi placuit legis habet vigorem." Such was the opinion of

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28 Levett, 71.

29 De Laudibus, ed. A. Amos, 4-5.

30 Ibid., 26-28.

many contemporary royal lawyers who argued that the king had received a complete final irrevocable delegation of power from the people.<sup>31</sup>

The Prince, in turn, asks the origin of the Dominium Politicum et Regale and the Dominium Regale kingdoms. The Chancellor answers that the absolute king is established by conquest and the subjugation of peoples. But there is a different kind of kingship, the one spoken of by St. Augustine in the De Civitate Dei, wherein the people joined together for the common good to form a political republic, with a king elected to protect his subjects' lives, properties and laws. For this end and purpose the king has delegation of power from the people and has no claim to any more power than they bestow. The king is pictured as the head of a mystical body, who guides and governs his people, just as the head is the ruler of the natural body.<sup>32</sup> Fortescue concludes this section by saying that besides England, Scotland, Egypt, Ethiopia and Saba in Arabia have the same type of regal-political government.

The Chancellor then begins a solid defense of English law against Roman Law and he shows that like the latter, English law is also derived from the law of nature. He traces English law from its beginning, repeating Bracton, that customary and statutory law

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31 Ibid., 34-36.

32 Ibid., 36-40.

has the validity of civil law.<sup>33</sup> He shows that English statutory law is made not only with the consent of the prince, but with the will of more than three hundred selected persons (Parliament) as opposed to the much smaller Roman Senate.<sup>34</sup> He compares the Roman Law, testimony based on two witnesses, to that in English Law, based on a jury, and he states his preference for the jury system, though he admits its faults.<sup>35</sup> Finally he gives detailed discussions of procedures in various cases, rulings and methods of the study of law and the progress made in procedure. On this note Fortescue concludes what is considered by some to be the first work on comparative jurisprudence written in England, if not in all Europe.<sup>36</sup>

The third work of Fortescue, On the Government of England (Monarchia), to be examined, was written between 1471-76. This work is the earliest constitutional treatise written in the English language.<sup>37</sup> It repeats the principles of the De Natura and De Laudibus. However, in its practical suggestions and analyses, it makes a vital contribution to the forming of the new monarchy under

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33 Ibid., 43-52.

34 Ibid., 53-58.

35 Ibid., 64-65.

36 Levett, 75.

37 Caroline, A. J. Skeel, "The Influence of the Writings of Sir John Fortescue," Royal Historical Society Transaction, X, (London, 1916), 88.

the Tudors, who actually followed many of its suggestions.<sup>38</sup> The republican form of government is ignored completely in this work while the Dominium Regale et Politicum and the Dominium Regale are once again defined. Fortescue argues that the absolute king possesses no greater extent of power not possessed by the politic king save the power to do wrong.

To be sure, the political king could not change the law without assent, but the regal king's freedom from restraint in this respect was no more than a liberty to sin, and that was no power at all. (De Natura, XXVI)

For all actions spring from two forces, will and power. Since man ever wished for good, the failure to attain it came not from will but from lack of power or impotence. Therefore, the regal king who sinned by forsaking the natural good of consent to laws could not be deemed more powerful than the king who did not so sin; and on the other hand, the good realized by the latter in obtaining consent to laws must be held to derive not only from his will but also from his power.<sup>39</sup>

In dedicating the Monarchia to Edward IV, as Plummer holds he did, Fortescue urges Edward to hold to the constitutional doctrines of the Lancastrian House, but he urges him to avoid its weaknesses, its lack of money, its subserviency to aristocratic influences, its lack of strong central government.<sup>40</sup>

The Monarchia also considers the appointment and composition of the king's council. Here Fortescue draws upon his own rich

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<sup>38</sup> Ibid.

<sup>39</sup> Chrimes, Dominion, 133. This argument comes from Boethius, De Consolatione Philosophiae, Lib. IV.

<sup>40</sup> Governance, Plummer, 87.

experience. He says that members should be chosen who are devoted to the service of the state rather than themselves. Nor should it be comprised exclusively of nobles, for the nobles are often too busy with their own affairs to be concerned with governmental duties. He urges that only the best men be selected and the Council be reduced to a manageable size. He plans a council of thirty-two men; twenty-four permanent councilors and eight lords, spiritual and temporal, who change every year. In a second plan he proposes only twenty councilors, whose work was to be administrative and deliberative, preparing legislative business for the Parliament saving that body valuable time.<sup>41</sup> In the judgment of Levett, Fortescue is establishing the lines according to which the Tudor Council, and later the modern cabinet, were developed.<sup>42</sup>

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<sup>41</sup> Ibid., 145-149.

<sup>42</sup> Levett, 79.

## CHAPTER II

### SCHOLARSHIP PRIOR TO 1869

In this chapter we shall make some attempt to evaluate the influence of Fortescue. Plummer states that he could find no reference to any of his works during the Lancastrian period,<sup>43</sup> but the popularity of the De Laudibus in the sixteenth century is evident, for it was printed no fewer than six times. The first edition of the Latin text in 1537 was followed by Mulcaster's English translation, which was printed five times before 1609.<sup>44</sup>

The Tudors had turned Fortescue's Dominium Regale et Politicum into a justification of arbitrary rule though they paid lip service to its forms.<sup>45</sup> In the reaction under the Stuarts, Fortescue was constantly appealed to as an authority by the parliamentary party. His writings, as Amos says, played a considerable part in the preservation of English liberties.<sup>46</sup> Limited authority

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<sup>43</sup> Governance, Plummer, 105.

<sup>44</sup> Skeel, 91.

<sup>45</sup> Ibid., 83-89.

<sup>46</sup> De Laudibus, ed. A. Amos, 23, 28, 60, 74, 94.

not arbitrary rule, was of course the spirit of the age. Actually Stuart absolutism was merely an outgrowth and accentuation, indeed a continuation of the Tudor arbitrary prerogative, with the polite forms often omitted. Far from claiming to act inside the law, James I held that by divine right he was above it.<sup>47</sup> But the seventeenth-century parliamentarians and constitutionalists who opposed this claimed the same arbitrary rule for Parliament. Parliament, originally merely a check on the king, was raised by the common lawyers to the position of supreme ruler. Fortescue was quoted on both sides of the struggle in accord with the prevalent legal attitude of the day, but the spirit and true import of Fortescue's doctrines were obscured.

In 1616 appeared a new edition of the De Laudibus. It consisted of the Latin text and Mulcaster translation, with a preface and notes by John Selden. Coke, one of the foremost common lawyers of the seventeenth century, praised highly both the De Laudibus and Fortescue. In fact, during this time, only Coke and a few of the common lawyers seem to have grasped Fortescue's central idea of a law limiting every earthly authority.

Between 1642 and 1660, Fortescue's views did not find much favor. Royalists disliked Fortescue's limitations of the

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<sup>47</sup> Max Adams Shepard, "The Political and Constitutional Theory of Sir John Fortescue," Essays on Political Theory, (N. Y., 1936), 289-319.



king's power and his attachment to feudal monarchy. They especially objected to his omission of any discussion of sovereignty. They considered his works hopelessly out of date.<sup>48</sup>

But though interest in Fortescue waned during the Commonwealth, it revived with the Restoration. Edward Waterhouse found it worth his while in 1663 to publish the De Laudibus with a lengthy commentary and found that even the Earl of Clarendon would accept its dedication.<sup>49</sup>

Later Fortescue was used by many Whig writers for repudiation of torture. He was appealed to in favor of the use of juries at the time of the Popish Plot.<sup>50</sup> His writings inevitably took on a more definitely Whiggish hue after the Revolution, when his support for the idea of the social compact was seized upon, and when his reputation stood so high that he could be classed by overzealous pamphleteers with Aristotle, Cicero and St. Augustine.<sup>51</sup>

In 1714, The Governance of England (Monarchia) was printed for the first time, under the editorship of Fortescue Aland, afterwards Lord Fortescue of Creadan. A second edition was issued five years later with the preface strongly advocating Whig doctrines.<sup>52</sup>

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<sup>48</sup> Ibid., 102.

<sup>49</sup> Ibid., 102-104.

<sup>50</sup> Ibid., 105-106.

<sup>51</sup> Ibid., 106-107.

<sup>52</sup> Ibid., 107.

In 1737 a much improved edition of the De Laudibus was published by Francis Gregor of Trewarthennick with a new translation, preface and notes, in addition to those of Selden. A second edition of the English text, together with a reprint of the 1737 Latin text, appeared in 1741. In 1775 an octavo was published, which was a reprint of the 1741 edition but without any new material. These editions indicate that Fortescue was still read in the eighteenth century, though his fame was over-shadowed by Coke and Blackstone among the lawyers, and Hobbes, Locke, Montesquieu and Burke among political thinkers.<sup>53</sup>

Even in the nineteenth century Fortescue's reputation remained high. In 1825 A. Amos, a barrister of Lincoln's Inn, republished Gregor's translation and text of De Laudibus, with notes of his own which bear definite traces of Benthamism. An edition of this work was published in Cincinnati in 1874.<sup>54</sup>

Amos's work brings us to Lord Clermont's famed two-volume edition of the Works of Sir John Fortescue published in 1869. Here we are indebted to Dr. Caroline Skeel for her work tracing Fortescue's influence to 1916.

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53 Ibid., 108.

54 Chrimes lists the editions of De Laudibus on page lvii, in his edition of the work. (Cambridge, 1942).

## CHAPTER III

### LATE NINETEENTH AND EARLY TWENTIETH CENTURY THOUGHT

In 1869 a two-volume work entitled, Sir John Fortescue, His Life, Works and Family, was published by Thomas Fortescue, Lord Clermont. Only 120 copies were printed for the work was destined only for important public libraries and family friends. The importance of this work does not lie in its evaluation of Fortescue's political thought but in the fact that it is a complete edition of all of Fortescue's known works. Then too, it contains the only available translation of De Natura Legis Naturae, done by the editor's brother, Chichester Fortescue, who also contributed a set of notes and a table of quotations to the text.<sup>55</sup> The translation of the De Laudibus Legum Angliae is that of Francis Gregor, first done in 1737. While it is outmoded, the English is accurate enough; Chrimes says one has the feeling he is reading Fortescue through "eighteenth century spectacles."<sup>56</sup> The Governance of England is from the text of Lord Fortescue of Creden, published in

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<sup>55</sup> Clermont, 1, 337-372.

<sup>56</sup> Chrimes, Dominion, 126.

1714, accompanied by an extremely Whiggish preface. The second volume contains a history of the Fortescue family dating from 1066. This 1869 edition is chiefly important for Fortescue's life and the translation of the De Natura.

After Clermont, the next important and scholarly work on Sir John is Plummer's edition of the Governance of England, published at Oxford in 1885. This work has been the cause of controversy among historians for many years. Neither Stubbs in Plummer's day nor Meilwain and Chrimes in ours agree with Plummer's conclusions. First, Stubbs and Plummer differ as to the very purpose of the Governance of England. Plummer maintains that it was written to warn Edward IV to avoid the weaknesses of the Lancastrian rule.<sup>57</sup> However, Stubbs points out that all reforms mentioned in the treatise, with few exceptions, had been in operation or at least in theory under the Lancasters, and therefore the work was written to urge Edward to revert to these practices.<sup>58</sup> An explanation may be found in the fact that though Fortescue knew the constitutional arrangements of the Lancasters and respected them, he also saw their weaknesses. Hence, practical as he was, he would advocate the good points and urge avoidance of the evils.

A more serious failing of Plummer's work seems to be his failure to evaluate accurately Fortescue's political thought. Both

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57 Plummer, Governance, 87.

58 Stubbs, III, 252-3.

Clermont and Plummer found nothing in the sources quoted by Fortescue on limited monarchy to justify his Dominium Politicum et Regale and were driven to conclude that while endeavoring to support his doctrine of constitutional monarchy by the authority of St. Thomas, he really derived it from his own liberal sentiments and the happy experience of his own country. They argue that he speaks as if he had no doubt whatever that his speculations were essentially those of the De Regimine Principum of St. Thomas and Egidius Romanus. Therefore, they conclude, perhaps Fortescue by dominium politicum et regale does not mean constitutional monarchy in our sense of the word.<sup>59</sup> If not, then in what sense does he hold it?

Limited or constitutional monarchy, in modern terms, means an organ or organs of government with an authority not exclusively derived from the king. For Fortescue there is no legitimate government outside the king's government, and he calls the government of England regimen politicum et regale; in other words, political and regal and therefore limited and absolute.<sup>60</sup> Plummer is doubtlessly right in identifying dominium regale with absolute monarchy in some sense, but he is just as quite wrong when he says

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<sup>59</sup> Clermont, I, 360 - Plummer, Governance, 172.

<sup>60</sup> Charles H. McIlwain, Constitutionalism, Ancient and Modern, (Ithaca, 1940), 89. Hereinafter cited as McIlwain, Constitutionalism.

that by dominium politicum Fortescue meant "republican government."<sup>61</sup> Republican can only mean an organ responsible to the people and independent of the king, with authority to control the king's acts of administration. It is better, for want of a better term, to use the word "constitutional" or a negative legal limiting of the king's government, by the right of his subjects, which the king has sworn to maintain, and which he cannot lawfully change or arbitrarily transfer from one subject to another. The king is limited in the actual exercise of his governmental functions by a competing authority which within its limits is as valid as his own. This reduces itself to the typical medieval theory of kingship. It is certainly not modern "constitutionalism." We cannot find in Fortescue, as Plummer seems to do, any trace of modern republican or democratic control of national administration.

Chrimes has called the Monarchia disjointed and lacking in originality and he says it was not even worth the effort of Plummer's whiggish scholarship.<sup>62</sup> True, the Monarchia is not original and it does repeat the arguments of the De Natura and De Laudibus. However, the value of Plummer's edition should not be underestimated. Though Plummer's conclusions have suffered serious criticism, his work can be of value if one is aware of its shortcomings.

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61 McIlwain, Political Thought, 360.

62 Chrimes, Dominion, 126.

We turn next to a man who dominated Plummer and from whom Plummer imbibed many of his ideas. William Stubbs (1825-1901) is considered a focal point in the study of English constitutional history. Stubbs held that the Lancastrian reign held a double interest: "It contained not only the foundation, consolidation and destruction of a fabric of dynastic power, but, parallel with it, the trial and failure of a great constitutional experiment; a premature testing of the strength of the parliamentary system."<sup>63</sup> The first statement is obviously true; however, the second leaves room for question. We must, however, accept Professor Stubbs' statement as true if we hold the Lancastrian reign as a constitutional venture, but against this argument is the proven fact that Henry IV did not relinquish any privileges pertaining to the crown when he came to the throne in 1399. Furthermore, if we are to agree with Chrimes and McIlwain that Fortescue's theory is essentially in line with the typical medieval theory of kingship, that is, of a king ruling by laws, then modern constitutionalism is not involved, though medieval constitutionalism very well may be. This is the period, in Fortescue's own words, that:

The seconde kynge may not rule his people bi other lawes than such as thai assenten unto. And, therefore he may sett uppon them no imposition without their own assent.<sup>64</sup>

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<sup>63</sup> Stubbs, III, 5.

<sup>64</sup> Plummer, Governance, 109.

Chrimes makes an interesting comment on the so-called constitutional leaning of Fortescue's theory. He states that Fortescue did not have a constitutional monarchy in mind at all, for Fortescue pictured the union of the people and the king at the same time, not the uniting first and then the electing of a ruler. In Fortescue's view, the people, when joining together in political society, necessarily established at the same time one ruler over them and this ruler was king. Fortescue did not conceive, as Locke did, that the people might agree to unite first and later by some further compact appoint a ruler to rule according to an agreed code of laws. His social contract was also itself the political one. Fortescue, he contends, treats the origin of political society and the formation of the monarchical state as one comparable to Hobbes in his Leviathan.<sup>65</sup> Both Chrimes and McIlwain maintain that to Fortescue practice and theory coincided. Fortescue was but voicing the common opinion and describing the ordinary facts of his time. "His originality lay not in any exceptional constitutional enlightenment nor in liberal sentiments, as Plummer and Clermont contend, but in his attempt to array bare constitutional facts in the imposing raiment of political theory."<sup>66</sup> Stubbs is primarily interested in constitutional practice rather than in the history of

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<sup>65</sup> Chrimes, Dominion, 141-147.

<sup>66</sup> Stanley B. Chrimes, English Constitutional Ideas in the Fifteenth Century, (London, 1936), 324. Hereinafter cited as Chrimes, Fifteenth Century Ideas.



theory. He explains Fortescue's theory and gives a thorough treatment of his practical suggestions.<sup>67</sup>

One interesting point Fortescue attempts to bring out throughout all of his writings is his intent on identifying government and the duties and obligations of monarchy. However, Stubbs does not share Fortescue's concern in identifying the duties of a king, for he makes this statement:

The discipline of the fourteenth century, culminating in the grand lesson of revolution, had left the nation in no ignorance of its rights and wrongs. The great law of customs, written in the hearts and lives and memories of Englishmen, had been so far developed as to include everything material that had been won in the direction of popular liberties and even of parliamentary freedom. The nation knew that the king was not an arbitrary despot, but a sovereign bound by oaths, laws, policies and necessities, over which they had some control. They knew that he could not break his oath without God's curse; he could not alter the laws or impose a tax without their consent given through their representatives chosen in their county courts. They knew how, when, and where those courts were held, and that the mass of the nation had the right and privilege of attending them; and they were jealously on the watch against royal interference in their elections. And so far there was nothing very complex about constitutional practice; and therefore little danger of dispute between lords and commons; the privilege of members needed only to be asserted and it was admitted; there was no restriction on the declaration of gravamina, or on the impeachment of ministers or others who were suspected of exercising a malign influence on the government. When the king promised to observe their liberties, men in general knew what he meant, and watched how he kept his promise. They saw the ancient abuses disappear; complaints were no more heard of money raised without the consent of parliament, or of illegal exaction by means of commissions of array; the abuses of purveyance

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67 Stubbs, III, 247-253.

were mentioned only to be redressed and punished, and if legal decisions were left unexecuted, it was for the want of power rather than from want of will.<sup>68</sup>

From this statement Stubbs appears to agree with Fortescue that the king governed by laws. Stubbs admits Fortescue's writings represent the view of the English constitution adopted as the Lancastrian program and on which the Lancastrian kings had ruled.<sup>69</sup> Yet in view of Stubbs' statement quoted above, he still contends the Lancastrian rule was a constitutional experiment. These two positions do not seem reconciliable.

In this enumeration of modern scholars who have worked on Fortescue, we should mention W. S. Holdsworth. Holdsworth treats Fortescue not so much as a political writer, but as a lawyer and judge. Holdsworth's History of English Law first began to appear in 1903, and is one of the outstanding writings in this aspect of history. He is primarily interested in Fortescue's comments on various procedures in the courts of the fifteenth century, and he gives little on Fortescue's political theory; however, he does make an interesting comment:

The practical influences which Fortescue's works have had has been curiously double. They have enjoyed the rare distinction of having suggested both the measures which led to the establishment of the strongest monarchy England had had since the time of the Norman and Angevin kings, and the arguments which were frequently and effectively used by

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68 Stubbs, III, 253-254.

69 Ibid., 247.

opponents to arbitrary rule.<sup>70</sup>

The next author in our list of critics is F. W. Maitland (1850-1906). F. W. Maitland's work, the Constitutional History of England, published in 1906, is disappointingly devoid of any detailed work concerning Fortescue, but then this was never one of Maitland's finished works. It was a series of lectures given at Cambridge in 1887-88 and based on student notes. Fisher, in the preface, points out that the work was compiled nine years before the Domesday Book and Beyond, ten years before Township and Borough and twelve years before Otto Gierke's now outdated work, Political Theories of the Middle Ages, and was never meant for publication nor was it the result of original research. In general, Maitland was influenced by Stubbs and he treated the Lancastrian view of constitutionalism in an orthodox manner by saying that the King of England was not absolute in any complete sense of the word but that he was absolute in a limited sense, bound by laws and customs.<sup>71</sup>

We can close this chapter with an examination of Dr. Caroline A. J. Skeel's paper, "The Influence of the Writings of Sir John Fortescue," written in 1916 and published in Publication of Royal Historical Society. This work traces the influence of Fortescue's publications from the fifteenth to the twentieth century.

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<sup>70</sup> Sir William Holdsworth, History of English Law, II, (London, 1923), 481-82.

<sup>71</sup> F. W. Maitland, Constitutional History of England, (Cambridge, 1908), 198.

Using the Calendar papers, State trials and historical collections Dr. Skeel studies how Fortescue was used during these centuries. She quotes Frederick Pollock's statement that, "Fortescue's conception of a true limited monarchy as Dominium Politicum et Regale appears to have been original with him for the common opinion was that only an elective king could have limited authority."<sup>72</sup> Pollock's statement would appear correct if we are to believe that Fortescue's dominium politicum et regale was entirely a product of his own mind. However, the king being elected had little to do with his being limited for we know that the medieval king, though not elected, was limited by law. While the king was absolute in a limited sphere he certainly was not arbitrary and the fact that he was elected did not deprive him of any rights of an hereditary king.

Dr. Skeel cites four reasons why she believes Fortescue's works have continued to survive: (1) they are short and easy to read, and have been consistently read from the fifteenth century to the present; (2) they attract the attention of the reader because they make the reader feel that the study of law is worthwhile and not beyond his intellectual capacity; (3) then, in him, one has an insight in the times; (4) and finally, they reveal an accurate opinion of Fortescue as a man.<sup>73</sup>

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<sup>72</sup> Skeel, 81.

<sup>73</sup> Ibid., 110-113.

The survey of late nineteenth and early twentieth century thought on Fortescue manifests the confusion which reigns among contemporary historians. It ranges from Clermont's and Plummer's belief that Fortescue really had in mind a modern constitutional monarchy to the denial of such a question by Stubbs and Maitland. Yet even their "constitutionalism" needed serious clarification. It was not clearly thought out at all.

## CHAPTER IV

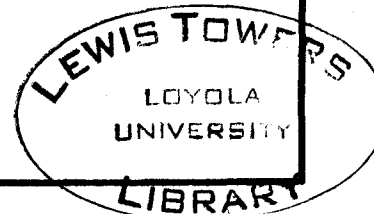
### McILWAIN AND CHRIMES

In recent times there has been a new and far more satisfying interpretation of Fortescue's political thought. Charles H. McIlwain and Stanley B. Chrimes, two leading historians who, while not contributing any new opinions, have managed to interpret Fortescue's writings in their proper setting, calling for a re-evaluation of his so-called "constitutional" monarchy. Past historians tend to treat Fortescue as an advocate of a kind of modern constitutional monarchy and this opinion prevailed until questions regarding it were raised by McIlwain in his Growth of Political Thought in the West, (New York, 1932).

McIlwain studies the sources of Fortescue's theory and notes that the authors quoted by Fortescue, principally St. Thomas Aquinas and Egidius Romanus, both authors of tracts entitled De Regimine Principum, do not mention a dominium politicum et regale, in the sense of constitutional monarchy. Therefore, in Fortescue we are dealing not with any modern constitutionalism but with a medieval type of kingship.<sup>74</sup>

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74 McIlwain, Political Thought, 362-363.



In modern times, constitutionalism has come to mean a system of checks and balances, but there is no identical system of checks and balances in medieval politics. However, there did exist a medieval constitution which, though unwritten, bound the king. Customs and statutes had such permanence that not even the king could break them.

The crux of the problem is how to explain Fortescue's dominium politicum et regale. McIlwain says, "dominion" is the key to Fortescue's theory. The essence of the theory of dominion is a hierarchy of rights and powers all existing in or exercisable over the same objects or persons, and the fundamental relationship of one power to another in this hierarchy is the superiority of the higher to the lower, rather than a complete supremacy in any one over all others.<sup>75</sup> "It was," as Chrimes states, "a theory maintaining the pre-ordained rightness of the relation of superior to inferior," and envisaged the whole of creation as the sum of parts which either served or were being served by one another. The sources of this theory were ancient. Its roots were to be found in Aristotle's theory of slavery, subjection, domination and rule and its growth was profoundly influenced by the feudal doctrines of the medieval period.<sup>76</sup> In short, the theory of dominion did have within it the possibility of reconciling the proprietary right of the

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75 Ibid., 355.

76 Chrimes, Dominion, 128.

king to rule with the proprietary rights of his subjects to possess. The king's dominion might limit the exercise of a subject's dominion, but not his dominion itself. Though Fortescue never defined dominion as such, this seems what underlies his understanding of it.<sup>77</sup>

"Politicum" to Plummer meant "republican," or an organ responsible to the people and independent of the king, with authority to control the king's acts of administration. But this was not Fortescue's mind. McIlwain in his analysis says that politicum means "constitutionalism" and implies an organ which controls the king in the actual exercise of the royal function by being a competing authority, which within its limits is as valid as the king's.<sup>78</sup>

"Regimen Regale" seems to refer to the mythical period of Brute which Fortescue accepted as historical, "for thus the kingdom of England blossomed forth into a regal and political dominion out of Brutus' band of Trojans, whom he lead out of the territories of Italy and of the Greeks."<sup>79</sup> Regale refers to a kind of royal absolutism and infers the basic rights of the royal power of the

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77 McIlwain, Political Thought, 355-357. The text of the argument on Dominion is taken from De Pauperie Salvatoris, written by Richard Fitzralph, Archbishop of Armagh. This work is quoted by both McIlwain and Chrimes.

78 Ibid., 360.

79 Sir John Fortescue, De Laudibus Legum Angliae, ed. S. B. Chrimes, (Cambridge, 1942), XIII, 33.



Lancastrians who had inherited it,<sup>80</sup> but in its exercise regimen regale refers to this complete power of one man who rules without counsel.

But then, there is that other concept of rule found in St. Augustine's City of God, where it is shown that some must govern, the rest be governed. Here the king is compared to the head of a natural body, a head which cannot change that body's nerves or sinews. So the king as head of the body politic cannot rule the people, except in accord with their nature and by laws passed with their consent. The king precisely has his power to protect his subjects in their lives, properties and law, and for this very end and purpose, he has the delegation of power from the people and he has no just claim to any other power.<sup>81</sup>

McIlwain explains that from this conception of regalian right it is evident that the king is under the law. But does this mean that this is a constitutional monarchy in the modern sense? McIlwain says no, for no other authority controls the king's government, even though Fortescue states the king cannot change the laws of the state, obstruct the subjects in "the discharge of their several offices," or deprive them of "their due proportion and element of blood."<sup>82</sup> However, let us consider Fortescue's statement

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80 Ibid.

81 De Laudibus, ed. Chrimes, XIII.

82 Ibid.

that England's government was both "political" and "regal," regal due to the Lancastrians being heirs to the ancient regalian rights and political because, as St. Augustine indicates, when government was formed the pure regal rights were modified and the king became the mystical but not despotic head of the people. The king can rule only with the assent of the people, yet to him government can only be the king's government.<sup>83</sup> There are other laws as valid as the king's, natural law, customs and statutes, which the king, as McIlwain says, must obey. "In the Middle Ages, in short, government was limited; in modern times it is also controlled."<sup>84</sup> Fortescue knew what a limited monarch was and he realized that English law possessed no written constitution and depended entirely on the natural law, customs and statutes for its validity. The king did not have a formal active force opposing and limiting him, but he knew the law and should realize his obligation to observe it. The king knew, too, that God's wrath would be directed against him should he fail to observe the law. Yet Fortescue saw the shortcomings of this legal order and sought to build a bulwark against any encroachments of private rights by the power of the monarchy.

McIlwain treats Fortescue again in his Constitutionalism, Ancient and Modern (Ithaca, 1940). Originally six lectures by McIlwain delivered at Cornell University in 1938 and 1939, this

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<sup>83</sup> Governance, Plummer, 109.

<sup>84</sup> McIlwain, Political Thought, 363.

work treats "a number of salient features in constitutional development." In the fourth chapter Bracton and Fortescue are discussed and their ideas compared. McIlwain considers the question of Bracton's knowledge of Roman Law. He says that Bracton knew Roman Law well, but by Bracton's time English customary law and the English court system were well established. By then there was no question of imposing Roman civil law on England. Yet Bracton learned from it certain basic principles of jurisprudence and procedure. He does not advocate its absolutism but, following the English tradition, says law is "only an authoritative promulgation by the king of what the magnates declare to be ancient custom."<sup>85</sup> This same position is found in Fortescue for he believed that the monarchy operated within certain definite limits established by law. In his discussion of politicum, McIlwain denies that it is well interpreted by Plummer's republicanism for "republicanism" in administration comes a century and a half after Fortescue and then only as a result of the English civil war.<sup>86</sup> McIlwain insists on the fact that Fortescue said the government of England was a regimen politicum et regale. It was at the same time "political" and "regal," limited and absolute; and these for Fortescue were not mutually exclusive terms.<sup>87</sup> Therefore, McIlwain believes that Fortescue's

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<sup>85</sup> McIlwain, Constitutionalism, 67-71.

<sup>86</sup> Ibid., 88-89.

<sup>87</sup> Ibid., 89.

constitutionalism is entirely medieval and not modern at all, and this position is also supported by Chrimes. There is no trace of modern republicanism or democratic control in Fortescue and his theory has nothing to do with our modern system of checks and balances. McIlwain in both his Constitutionalism, Ancient and Modern and Growth of Political Thought in the West has the great value of explaining clearly medieval government as medieval, in terms of medieval and not modern principles.

Stanley B. Chrimes, the second of more recent scholars presenting a re-evaluation of Fortescue, makes his first important contribution in his Alexander Prize Essay, "Sir John Fortescue and his Theory of Dominion," (Transactions of the Royal Historical Society, 1934). This short work studies Fortescue somewhat in the manner of McIlwain, although Chrimes does not always agree with him but in making the theory of dominion the essence of Fortescue's thought, both are in agreement and both argue from Richard Fitzralph's De Pauperis Salvatoris, written about the middle of the fourteenth century.

Chrimes treats the origins of the Dominium Regale, Dominium Politicum and the Dominium Politicum et Regale, and stresses the difference between a regal and political king. He says that Fortescue admits that the king can act regally,<sup>88</sup> however, he is

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<sup>88</sup> N.L.N., (Nature of the Law of Nature), XXV.

extremely careful in appealing to any emergency power, the power used when the law is either not clear or non-existent.<sup>89</sup> Fortescue, Chrimes points out, makes both kings, the Dominus Rex and the Dominus Politicus, of equal authority. Authority differs because of the different origins of the two dominions.<sup>90</sup> Fortescue had explained that one held rule by conquest, the other by consent. The king who ruled by conquest held right was might, while the king who ruled by consent maintained right was based on the union and consent of the people. However, as power, their right was equal.<sup>91</sup>

Chrimes reconsiders the sources of Fortescue and he notes that Clermont and Plummer were surprised at not finding in Fortescue a highly modern notion of dominion politicum et regale, which they held was in texts of the thirteenth century.<sup>92</sup> Chrimes agrees with McIlwain as to the manner in which Fortescue evolved his dominion politicum et regale, but he admits the confusion that confronts a solid solution of the problem. In St. Thomas and Egidus Romanus, used as authorities by Fortescue, there is no mixture of dominion politicum et regale as Fortescue advocates it. Nor could Fortescue have received the doctrine from conditions

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89 Ibid., XXIV

90 De Laudibus., XII-XIII.

91 Chrimes, Dominion, 135-6.

92 Ibid., 137.

existing in the England of his day. And how could he quote Ptolemy of Lucca, a continuator of St. Thomas, whose "dominion regale" was actually despotic to the point of being anti-monarchical?<sup>93</sup> Therefore, the problem is how Fortescue reconciled all these views in his own mind.

St. Thomas and Egidius did treat of dominion regale and dominion politicum but Fortescue combined both doctrines, and he writes of them as if said combination was taught by the two authors.<sup>94</sup> It seems that he found in St. Thomas, Ptolemy and Egidius a theory of dominium politicum, a rule according to laws made not by one man alone but by many and he felt that this could be joined to dominium regale, with the latter losing nothing more than the prince's exclusive legislative monopoly. That combination, he believed, was a fair description of English politics in his day.

Fortescue made this advance over the authorities quoted in that he combined certain features of their work to meet the situation he faced.<sup>95</sup> But McIlwain insists that Fortescue is using the phrases dominium regale and dominium politicum in a sense consistent with the monarchical doctrine of St. Thomas and Egidius, and this excludes any "republicanism."<sup>96</sup> Fortescue, seeing

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93 McIlwain, Political Thought, 359.

94 Chrimes, Constitutional Ideas, 315.

95 Ibid., 315-316.

96 McIlwain, Political Thought, 359.

St. Thomas, Ptolemy and Egidius agree to part of his own theory, seems to have extended their authority for the whole. Actually, this was quite in line with loose medieval methods of citation, especially among the jurists.<sup>97</sup> Hence we can say that Fortescue believed that he found in those men a theoretical explanation of the English polity as he knew it from experience.<sup>98</sup>

The first basic difference between Melliwain and Chrimes is in the interpretation of terms. Chrimes points out that Melliwain in his Growth of Political Thought in the West does not make a clear distinction between limited and constitutional monarchy. Melliwain refers to them as the same, meaning an organ or organs of government containing an authority not exclusively derived from the king.<sup>99</sup> On the other hand, Chrimes separates limited and constitutional monarchy. He identifies limited monarchy as that form of government where the king's power is absolute, except in certain spheres delimited by laws and customs; but constitutional monarchy is limited but not absolute, for the king's power is controlled by some coexistent power whose authority is as valid as his and which he cannot over-ride. An absolute monarchy is not necessarily despotic, for though he may be restrained only by customs or by moral and material forces, his power need not

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97 Chrimes, Constitutional Ideas, 316.

98 Chrimes, Dominion, 139-140.

99 Melliwain, Political Thought, 359.

be arbitrary.<sup>100</sup>

The distinction is important. In view of what we already know about Fortescue, we realize he could not be propounding a theory of modern constitutional monarchy because his theory of a king ruling under the law was essentially a medieval theory.<sup>101</sup> Fortescue treated facts as they existed in his day, and, as Chrimes points out, practice and theory in these constitutional matters coincided. Fortescue, in saying they did, was but voicing the common opinion. "Fortescue's originality lay not in any exceptional constitutional enlightenment nor in liberal sentiments, but in his attempt to array bare constitutional facts in the imposing raiment of political theory."<sup>102</sup>

The second work of Chrimes, on Fortescue, English Constitutional Ideas in the Fifteenth Century, appeared in 1936. This work treats virtually every important question that grew out of the complex legal thought of that century. Chrimes says the work is, "the outcome of a desire to pursue further the suggestions made by T. F. Plunknett in his essay on the Lancastrian Constitution, which was published in 1924 in the volume of Tudor Studies presented to A. F. Pollard." Plunknett sees a kind of vague idea of constitutionalism during the period, and Chrimes in his work agrees but

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100 Chrimes, Dominion, 141.

101 Ibid., 143-4.

102 Ibid., 147.



says it is not a constitutional but rather a limited concept of monarchy. However, Kenneth Pickthorn, in his Early Tudor Government, will not allow this and says that no really even limited idea of monarchy existed during the fifteenth century.<sup>103</sup> Pickthorn's opinion has not received acceptance for most authors feel that regardless of the age, some sort of constitution did exist.<sup>104</sup>

Chrimes discusses this vague "limitation." He treats the question of the king's estate and the kingdom as real property, which in the fifteenth century, he holds, were conceived of as inseparable from the king's own person. But regardless of his authority, the king was still bound to exercise the duties of a king according to the law and the form of law determined by the judges.<sup>105</sup>

He discusses also the nature of the fifteenth century parliament. In the first half of the century it is thought of as the king's high court, yet also as a representative political assembly with authority only secondary to the king; however, in the second half of the century parliament was being conceived of as actually necessary to any legislative enactment. Gradually,

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<sup>103</sup> Kenneth Pickthorn, Early Tudor Government (Cambridge, 1934), 47-48. "So long as dynastic rivalry, actual or potential, is the main preoccupation of politics, the evolution of constitutionalism is impossible."

<sup>104</sup> Chrimes, Constitutional Ideas, XV-XX.

<sup>105</sup> Ibid., 61.

not only the king's assent but the assent of the majority of parliament was considered necessary for legislative action. True, no "constitutional" process, as we know it, was as yet evident, but it was beginning to take shape. After all, Fortescue's theory was a theory of monarchy, not of state. He does not make a definite pronouncement regarding parliament, however much he praises it.

Part of Chrimes' work is devoted to a comparison of the ideas of Fortescue and Bracton. Actually, Fortescue never made reference to Bracton, nor does he seem to have been influenced by him, but a comparison is of value. Chrimes accordingly examines Bracton and Fortescue on four points. The first deals with the king's adjudicating and fiscal capacity as being limited by the assent of Parliament. Bracton conceived of the king as adjudicating with the cooperation of the magnates, but placed no emphasis on the necessity of the assent of such a body for valid legislation. But when Bracton wrote, parliament was in its formative stage and the commons were not completely represented.<sup>106</sup> Nevertheless, Bracton states clearly that the law makes the king and is above him, a point with which Fortescue agrees.<sup>107</sup>

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<sup>106</sup> McIlwain, Constitutionalism, 89.

<sup>107</sup> Chrimes, Constitutional Ideas, 325. - McIlwain, Constitutionalism, 89-90.

The second comparison is that by this assent of parliament, the king's power is not diminished. Both Bracton and Fortescue hold this to be true. Bracton believes that the king, in following the law, was the vicar of God and the assent of parliament to something lawful was superfluous. On the other hand, though, Fortescue contended that the Rex regalis et politicus was restrained by God's law and existing human laws nevertheless needed parliamentary assent.<sup>108</sup>

The third point involves the situation where the king, with the assent of parliament, could change and add to the law. Bracton wrote too early to put much accent on this parliamentary assent as being necessary for law giving, although he did mention a vague counsel and advice of the magnates and acceptance by the community in this connection. This seems to underlie Fortescue's idea of the councilium.<sup>109</sup>

The fourth comparison asks if the civil law principle of "Quod principi placet legis habet vigorem" was valid in England. Bracton did not totally reject this statement but modified it by interpreting it as meaning 'what is agreed upon after deliberation with his council of magnates' and what was according to the law. This placed definite limits on the king. Fortescue, interestingly enough, was entirely opposed to this principle of the Roman law.

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108 Chrimes, Constitutional Ideas, 325-6.

109 Ibid., 326-327.

Therefore, because of the changing times, we can conclude that while Bracton and Fortescue share some ideas, there is no evidence of a direct relationship between them, though both of them do have the same solid background, namely the old principles of the common law.<sup>110</sup>

Chrimes shows the increasing interdependence in the fifteenth century of the king and parliament. They had to work together for their mutual success. The king was, therefore, strongest when he was in accord with parliament, and ruled according to the law. But this implies no modern constitutionalism and Chrimes is at his best when he gives noted evidence that no modern constitutionalism ever existed in the fifteenth century. Perhaps it was in the air; there was a growing confusion of ideas medieval and modern, but political forms had not crystallized into what would be later modern constitutionalism.

The last of Chrimes' works on Fortescue is his edition of the De Laudibus Legum Angliae, Cambridge, 1942, a part of the Cambridge Studies in English Legal History. Again the same excellent scholarship that Chrimes displayed in the two works previously examined is evident. The translation itself is excellent and includes the actual Latin text. By comparison with other translations this is a modern, readable work that possesses the good qualities of all previous editions, plus a thoroughly

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<sup>110</sup> Ibid., 327-328.

annotated text, a chronology of Fortescue's life and a discussion of Fortescue's life and works. In addition, Chrimes gives a complete listing of the manuscripts of the De Laudibus, its sources and appends a discussion of the date of composition which he says must be between 1467 and 1471.

Of major interest is the preface of Harold D. Hazeltine, Professor of Law at Cambridge and editor of the Cambridge Studies in English Legal History. Hazeltine praises Chrimes' work and puts it on a level with Plummer's edition of the Governance of England. Hazeltine then discusses Littleton and Fortescue, Littleton as an expert in private and Fortescue in public law.<sup>111</sup> The editor points out that while Littleton and Fortescue differ in nature and scope, nevertheless they continue to stand on the same common ground. They are both grounded in the common law and use it as a starting point for all subsequent discussion. Second, they each rely on "land law" which Fortescue used in his theory of succession. Third, instead of stressing the mere form of common law, Fortescue and Littleton stressed theory and sought to explain the fundamental concepts underlying the common law. Finally, both

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<sup>111</sup> J. M. Rigg, "Sir Thomas Littleton," D.N.B., (London, 1909), 1252-1255. Judge and legal author (B. 1422-D.1481): "Wrote a short treatise on 'tenures' which gives a full and clear account of the several estates and tenures they knew in English law with their peculiar incidents. Probably no legal treatise ever combined so much of the substance with so little of the show of learning or so happily avoided pedantic formalism without forfeiting precision of statement."

realized that this common law of England was peculiar to itself and had its own rules, principles and doctrines.

## CHAPTER V

### OTHER TWENTIETH CENTURY HISTORIANS

Following McIlwain and Chrimes there remain a few authors who have contributed to further studies concerning Sir John Fortescue. One of the most important of these men is E. F. Jacobs, who, in his essay, "Sir John Fortescue and the Law of Nature," examines the theory of natural law as it was applied by Fortescue to the question of succession.<sup>112</sup> On this point, as the basis of his discussion, Dr. Jacobs is generally accepted as the authority. He uses Fortescue's De Natura Legis Naturae, published in Lord Clermont's work.

Fortescue says that the law of nature was the divine law from which the absolute and limited monarchy originated and from which all rights are derived. The law of nature governed the world before God gave Moses the Commandments on Mount Sinai.<sup>113</sup> This law is superior to custom and statute, and many kings were

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<sup>112</sup> E. F. Jacobs, "Sir John Fortescue and the Law of Nature," Bulletin of John Rylands Library, XVIII, (Manchester, 1934), 359-376.

<sup>113</sup> Clermont, I, De Natura Legis Naturae, N. L. N., IV, 193.

created by the law of nature alone.<sup>114</sup> Fortescue treats the divine creation of the law of nature, quotes St. Thomas' De Regimine Principum,<sup>115</sup> and asserts that judges should know the natural law more ably to administer justice. Therefore, justice was ordained by divine providence in terms of the law of nature.<sup>116</sup> Without agreement with the law of nature it is impossible for man to attain to God his final end.

Fortescue shows the practical application of this law of nature in the second part of his De Natura Legis Naturae, which deals with the question of succession. As Dr. Jacobs points out, it was in 1399 that Henry of Bolingbroke claimed the crown by right of true descent (actually an erroneous claim), by right of divine favor, shown by his recovery of it, and on the basis that he was removing a lawless king. It was some seven years later that he sought recognition of his royal rights by statute of parliament. From that time on such parliamentary approval was considered valid claim to the crown.<sup>117</sup>

Objection to this attempted recognition was raised by the Duke of York, who forced the lords finally to say that statutes of the realm were actually stronger than any documentary proof of

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114 Ibid., VI, 195-6

115 Ibid., XLVI, 246-7.

116 Ibid., XXXV, 229-230.

117 Jacobs, 360-63.



descent. York replied that the oaths given Henry were invalid in the face of God's law and the Commandments, for oaths were to confirm truths, and the peers should aid the truth. York pointed out that only under Henry was a parliamentary statute of succession deemed necessary and that if Henry were a legal king he would not have needed such an act. The fact that this question was even asked and that the lords were finally forced to speak, shows that by that time there were no clear principles of public law concerning the question of succession.

During the controversy Fortescue, then in exile, wrote in favor of the Lancastrians. Later however, he renounced these writings including the De Natura Legis Naturae, which contains his last discussion of the succession question.<sup>118</sup>

Jacobs says that Fortescue's discussions of the natural law was influenced by St. Thomas, who had formulated the theory of primary and secondary causes into terms of the law governing the universe. For St. Thomas all laws manifest the divine reason, to which all earthly law is subject. A rational creature can participate more fully with God and by the light of natural reason inclines toward the acts and the end that reason prescribes. But positive law derives from practical reason and is promulgated for the government not of a person but of a political society. What, therefore, was the ultimate relationship of positive law to the

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118 Ibid., 362-3.

law of nature?<sup>119</sup>

Jacobs argues that St. Thomas shows the relationship between natural and positive law by drawing a parallel between speculative and practical reason. In the speculative sphere results or conclusions are not reached deductively by reason but are known by the very law of nature, whereas human reason has to deduce from this law of nature the laws which apply to particular cases. Admittedly this is how human laws are derived; yet to be truly laws, they must be founded on the natural law. Fortescue is especially concerned to show the relationship between this natural positive law (ius regis); he discusses what if there be any serious discrepancy between natural and royal law? If royal law can take precedence over even the natural law, then "the arbitrary acts of a king have a validity that nothing could shake."<sup>120</sup>

There is a practical case before Fortescue as he writes in the second part of the De Natura Legis Naturae. The king has a daughter and a brother; the daughter has a son. The king dies without a son. To whom does the kingdom descend?<sup>121</sup> First the daughter appeals to Justice, who is the judge, saying that the king's grandson proposes against both the natural and divine law to exclude her from her lawful inheritance, and she argues that

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<sup>119</sup> Ibid., 365.

<sup>120</sup> Ibid.

<sup>121</sup> Clermont, I, N. L.N., 249-50.

the crown, the highest rule, is a private possession the same as any private domain.<sup>122</sup>

The grandson replies, "Human law does not regulate a public office like a piece of land, or a position in a household." True, a daughter can minister property but not in the highest office, from which nature has separated her.<sup>123</sup> The grandson shows that the ancient kingdoms of Israel and Judah did not descend to women,<sup>124</sup> and he claims the title from the Scriptures appealing to the words of the Magi, "Where is he that is born King of the Jews?" By this statement the grandson contends that he can rule while his mother still lives,<sup>125</sup> for the statement implies that the rights of the mother do not apply to public rule.

The king's brother begins his own argument with an argument from nature.<sup>126</sup> He stresses the physical differences in man and woman. Socrates and Plato did allow women to fight, but Aristotle, St. Thomas and the Canon Law repudiate Socrates and Plato.<sup>127</sup> Therefore, women cannot fight, nor are they allowed to judge, the highest spiritual action, for both require the highest

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122 Ibid., II, 250-51.

123 Ibid., III, 251-52.

124 Ibid., IV-V, 252-55.

125 Ibid., VI, 255-56.

126 Ibid., VII, 256.

127 Ibid., IX, 259-60.

degree of courage and virtue.<sup>128</sup> The brother discredits the daughter's argument by the observation, "who ever hunts hares with cats?", saying that women are weaker and actually less rational than men.<sup>129</sup>

He then disproves her son's right to rule by quoting the law of succession in France. "If anyone shall grant lands to a man and his male heirs, and that man has a daughter, but die without leaving a son, no one doubts that the land returns to the donor."<sup>130</sup> Even if the dead man's wife remarries after her husband's death, and has a son, neither her son can claim that land, nor can it be claimed if a son is born to the daughter while the father is still living.<sup>131</sup> Then too if the older of two sons succeeds to his father's inheritance, but the elder son has no son but a daughter, who has a son, on the death of the father the estate goes to the junior son, not to the daughter of the elder son or to her son.<sup>132</sup>

The brother then refutes the son's argument from the Scriptures by saying, that Our Lord did not become King of the Jews through his mother, even though Joseph was an heir, and

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128 Ibid., VIII, 257-58.

129 Ibid., IX, 259-60.

130 Ibid., X, 260-61.

131 Ibid.

132 Ibid.

therefore how can the mother give something she does not possess.<sup>133</sup> Note that in all these arguments Fortescue bases the contention of the king's brother on the conception of the kingdom as real property,<sup>134</sup> an argument which Chrimes argues was still perfectly valid during the fifteenth century<sup>135</sup>.

Chapter XIII of the De Natura begins the "replication of the complaints, vis., of each of them against the allegations of the others". The daughter complains that she is a woman fighting two men, one her son, the other her husband's brother. She argues that it is unjust that a woman can not succeed in her son's life-time, and that she is debarred from the throne because she can not make war or judge. She then claims that she can rule with the help of advisors, and do her royal acts through vicars, as David through Job and Justinian through Belisarius.<sup>136</sup>

The son replies to his mother, and claims the crown not as his mother's heir, but as his grandfather's. He argues that he should have succeeded if his father had been his grandfather's own son, so why should he not succeed through his mother.<sup>137</sup> He follows this by arguing that woman was made to be

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133 Ibid., XI, 262.

134 Jacobs, 371.

135 Chrimes, Constitutional Ideas, 13-14.

136 Clermont, I, N.L.N., XV, 267.

137 Ibid., XVI, 268-69.

subject to man<sup>138</sup> for a woman did not bring forth Adam or Eve. A woman can indeed conceive and bring forth, but can not procreate; it is the work of a man to create in the image of God, and since to rule the world is to procreate the "ymago Die", such rule belongs to a man.<sup>139</sup>

In turn the king's brother answers his niece. He points out that it is not woman's infirmities which prevent her from ruling, but rather the lack of her natural ability.<sup>140</sup> Divine decree prevents her from ruling and argument from natural reason is only secondary.<sup>141</sup> He traces the divine law and argues that even though it can only be discovered by discursive reason, when it is revealed it is more stable than any ratio discurrens. Original sin, he argues, struck woman more severely than man, and he draws from the events in the garden of Eden an interesting contrast between the qualities of the lex naturae and the lex divina.

The law of nature left woman to be subject to her lord at his own will, when women refused, the law compells her by another's will. The law of nature had sanctioned her obedience to her husband, and the ius divinum, when she abused her liberty, subjugated her to her husband. The natural law directed that she should be

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138 Ibid., XVIII, 270-71.

139 Ibid., XIX, 272-73.

140 Ibid., XXIV, 278-79.

141 Ibid., XXV, 279-80.

compelled and governed by her husband, and the divine law, when woman made naught of it and sought to teach her husband, made him a more severe pedagogue than he was before.<sup>142</sup> The argument is that the Divine law, to which the king's brother is now appealing, binds men more strongly than the law of nature. Nevertheless, he says we rely sometimes on the natural law for the solution of our problem, for divine law is infinite and surpasses all human understanding. Therefore, though there is no comparison between divine and human law, and the only possible mediator between the two, even though defective, is the natural law.<sup>143</sup>

The brother then refutes the grandson by secular law and shows that the woman can not transfer to the grandson, unless she possesses a thing to transfer, and here that thing is the Crown.<sup>144</sup> In England, the son may endow his wife during his father's lifetime with his father's patrimony ad optium ecclesiae, provided the father gives his assent, but the son cannot do it with another's patrimony, even though the other gives his consent. If any grandson seeks in the King's court property so entailed, although his father dies in the lifetime of his grandfather, the claimant will the property descended to his father from the grandsire.<sup>145</sup> The

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142 Ibid., XXVII, 282-83

143 Ibid., XXIX, 285-86.

144 Ibid., 288-89.

145 Ibid., XXXII, 290.

Regnum as such cannot descend to the female either by divine or natural law.

After hearing all the arguments, Justice then proceeds to sum up the various views and finally comes to a decision. The daughter in the nature of the universe is subject to man and can not succeed. The grandson cannot rule by virtue of the mother's elimination. Finally the king's brother wins the crown. However, Fortescue hastens to add that the arguments should be dispatched to Rome to be examined by the Pope, as the interest of the crown in view of the complexity of the discussions needs a defender.<sup>146</sup> Here Fortescue indicates that he holds the Pope to have supreme judicial power.

One can see by the kinds of arguments used, namely arguments based on real property, divine and natural law, that there was complete chaos concerning the question of succession and no statutes or customs existed to take care of this problem.<sup>147</sup> Jacobs makes the criticism that Fortescue is by no means consistent in his demonstrations. He begins by repudiating the use of the courts and the civil law for settling these questions, yet in the last part of the De Natura the king's brother draws freely upon them, and in the final decision he receives the crown. "Law to

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<sup>146</sup> Ibid., LXXI, 332-333.

<sup>147</sup> Jacobs, 374-5



Fortescue seems to have been a vestment shot with many colors."<sup>148</sup> Jacobs also states that aside from Fortescue's theory of Dominium Politicum et Regale, there is nothing particularly original in his treatise.<sup>149</sup> We must realize that this was a theory, regardless of meaning, ahead of its time. Jacobs is careful to point out the effort of Fortescue to be logical about the question of succession because Sir John realized well himself the complete lack of any guiding authority in this matter. He does attempt to set a precedent for the settlement of this vital question and his appeal to the natural law indicates the sound basis upon which he sought to construct his argument.

In conclusion, therefore, Jacobs treats succession rather than the theory of government in Fortescue, and though his treatment of the former is clear, it is more in the field of the latter that our main interest in Fortescue lies.

Another essay that ought to be examined appears in a work dedicated to Charles McIlwain. Essays on Political Theory was published in 1936 on the occasion of his elevation to the presidency of the American Historical Association in that year. As his contribution Max Adams Shepard has written an essay, "The Political

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<sup>148</sup> Ibid., 375.

<sup>149</sup> Ibid., 376.

and Constitutional Theory of Sir John Fortescue".<sup>150</sup> Shepard, as McIlwain's student, follows McIlwain's position but makes some excellent observations of his own.

He stresses the middle class background of Fortescue. Fortescue was a member of the English squirearchy, which was becoming the most important class in the community. This class sought conservatively to uphold the common law, which protected it in its landed property, and to restore political stability so that it might prosper.<sup>151</sup> As Shepard states, "Fortescue was still too much a creature of prevalent medieval tradition to create sanctions so powerful that like Frankenstein's monster they turn into arbitrary forces on their own account."<sup>152</sup> Fortescue meant to keep the balance of power in the hands of the middle class rather than in the hands of the common people. Shepard points out Fortescue's practical solutions, for example his advising the use of people who were experts in a certain field, usually of the middle class, who would prepare measures for lay legislators.<sup>153</sup> He gives a detailed discussion of the law of nature, and while his observations

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<sup>150</sup> Max Adams Shepard, "The Political and Constitutional Theory of Sir John Fortescue", Essays on Political Theory, (N.Y., 1936), 289-319.

<sup>151</sup> Ibid., 291.

<sup>152</sup> Ibid., 290.

<sup>153</sup> Ibid., 293.

are generally sound, he adds little to what Jacobs has already said.

Shepard, however, seems to be in error when he states that Lord Clermont, with whom Mr. Plummer and Professor McIlwain agree, holds that Fortescue gives St. Thomas as the true source of his doctrine of constitutional monarchy, and prefers to say that Fortescue "really derived them from his own liberal sentiments, and the happy experiences of his own country."<sup>154</sup> Shepard feels that some form of mixed government can be found in St. Thomas and that St. Thomas favored this mixed government over the royal or despotic type. He also holds that Fortescue is actually trying to clarify St. Thomas' position. But there are serious doubts as to Shepard's conclusions and McIlwain holds against them.<sup>155</sup>

Shepard agrees with McIlwain in holding that Fortescue is not advocating a modern constitutional government, with its system of separation of powers and checks and balances,<sup>156</sup> that he is still predominantly medieval, though with a few modern tendencies.<sup>157</sup> He concludes that Fortescue holds strongly to a "rule of law," limiting all earthly authority. With a few exceptions he follows McIlwain closely, and his views fit with the circumstances

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<sup>154</sup> Clermont, I, 360 - Plummer, Governance, 172.

<sup>155</sup> Shepard, 309.

<sup>156</sup> Ibid., 312.

<sup>157</sup> Ibid., 314.

surrounding Fortescue's writing. His main contribution is his development of Fortescue's defense of the middle class.

In 1936, Vol. VIII of the Cambridge Medieval History appeared with an article by C. H. Williams, "The Yorkist Kings, 1461-85."<sup>158</sup> In it Williams treats of Fortescue, taking the same general approach as McIlwain. He condemns those who say that Fortescue was the prophet of the Tudor type of government. He realizes the distinctly medieval cast of Fortescue's thought and he further states that the essence of Fortescue's ideas lie in his thoughts on the nature of kingship. Williams says that the dominium politicum et regale of Fortescue seems to mean no more than the concept of a king ruling under the law and he emphasizes Fortescue's concern that the people consent to the law. Besides treating the practical side of Fortescue's work, Williams points out that Fortescue did not at any time exalt parliament over the king. He notes too that Fortescue is careful to keep the king's council free from parliamentary control, which would indicate that there was no thought on Fortescue's part of any republicanism.<sup>159</sup>

There also appeared in 1936 Vol. VI of the Carlyle's History of Medieval Political Theory in the West. In their discussion of Fortescue's political work they repeat that Fortescue's

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<sup>158</sup> C. H. Williams, "Yorkist Kings, 1461-85," Cambridge Medieval History, VIII, (Cambridge, 1936), 418-449.

<sup>159</sup> Ibid., 443.

basic argument was that the rule of the kings of England was not simply "regale," that is to say, arbitrary, but that it was "regale et politicum," or a rule with the consent of the subjects, although kings within the limits of their delegated authority were absolute.<sup>160</sup> They show that Fortescue's statement that the civil law principle, "quod principi placuit," was not in use in England was valid although there is no questioning the fact that some English kings had ruled arbitrarily and contrary to English law.<sup>161</sup> Carlyle has a short discussion of Fortescue's comparison of England and France in which Fortescue says that in France the king ruled regimen tantum regale and crippled the political life of the people.<sup>162</sup> Carlyle recognizes also that Fortescue does not advocate "constitutionalism" but is a typical medievalist. The Carlyle work is a concise, adequate treatment of Fortescue and has the benefit of the excellent scholarship done in the twentieth century.

The most recent article on Fortescue appeared in 1949 in The Social and Political Ideas of Some Great Thinkers of the Renaissance and Reformation, edited by F. J. Hearnshaw. The essay on Sir John Fortescue was written by Miss A. E. Levett (King's

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<sup>160</sup> R. W. & A. T. Carlyle, Medieval Political Theory in the West, VI, (Edinburgh, 1936), 143.

<sup>161</sup> Ibid., 174.

<sup>162</sup> Ibid.

College, London), who calls Fortescue an essential link in the chain of English lawyers expounding English Law, a view quite in the tradition of McIlwain and Chrimes<sup>163</sup>. She says that Fortescue is a typical medieval Englishman living at the time of the Renaissance rather than a typical thinker of the Renaissance.<sup>164</sup> However, her opinion that Fortescue wrote for the man in the street directly contrasts with that of Stubbs that the average man knew his rights and needed no law tracts to enlighten him.<sup>165</sup> Levett treats Fortescue's De Natura, De Laudibus and Governance, giving the important facts of each but unfortunately her treatment of Fortescue's forms of rule consists in merely defining the three types of government, Dominium Regale, Dominium Politicum and Dominium Politicum et Regale.

She discusses Fortescue's religious policy, a policy which is separate from his secular theory. The Pope, as the Summus Pontifex, is something Fortescue takes for granted (N.L.N., LXXI). Her opinion that Fortescue lived a generation too late to have been influenced by the Conciliar Theory can scarcely be justified, for even during his later years it was a major problem in the Church.<sup>166</sup> She follows Dr. Skeel's work in her conclusions as to

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<sup>163</sup> McIlwain, Constitutionalism, 88-89, - Chrimes, Constitutional Ideas, 325-328.

<sup>164</sup> Levett, 68.

<sup>165</sup> Ibid., - Stubbs, III, 253-4.

<sup>166</sup> Levett, 882.

Fortescue's influence and she notes that Maitland curiously had so little to say about Fortescue. She conceives of this as curious because of the rejection of Roman Law in the sixteenth century about which Maitland speaks so often. Actually, the impact of the Roman Law on the sixteenth century was of tremendous seriousness but Fortescue had set down the very reasons which Maitland also adduced for the survival of English law, namely, the excellence of its basic organization and the teaching of the Inns of Court.<sup>167</sup> Levett also gives considerable attention to Fortescue's middle class background, as Shepard did, and quotes some of Fortescue's writings describing life at the Inns of Court.

In summary, the picture she draws of Fortescue is of great value. Miss Levett sees Fortescue as an Englishman, first, last and always. She tries to bring Fortescue to life, to show him the honest man he was, wise above the average, sane, scholarly, yet practical; the lover of justice, tolerant, humane, patient, talking little of unbridled liberty, less of freedom of thought, yet spending laborious days and nights in endeavoring to give to his fellows that justice which is the basic side of true liberty.<sup>168</sup>

In concluding our study with Dr. Levett's work we ought to synthesize the scholarship of Sir John. Prior to the nineteenth century, scholarship concerning Fortescue consisted solely in the

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167 Ibid., 70-71.

168 Ibid., 84-85.

translation of his works, and this preserved his valuable political ideas. But it remained for the nineteenth century to begin the real investigation of his political thought. Lord Clermont collected and edited all of his works, Plummer treated in detail the Governance of England, but both Clermont and Plummer considered Fortescue as advocating an almost "modern" constitutional monarchy because of their lack of knowledge of medieval kingship. William Stubbs, entranced by "parliamentarianism," considered the Lancastrian reign as a constitutional venture, a theory no longer in acceptance. There was a medieval constitutionalism but not as interpreted in the modern day system of checks and balances. Then Dr. Skeel's work traced Fortescue's influence up to 1916 but she gave no penetrating analysis of his works.

It was not until 1932 and Charles McIlwain's The Growth of Political Thought in the West that some effort was made to answer the question, whether Fortescue was a true advocate of constitutionalism? McIlwain and later Stanley B. Chrimes, who follows him, answered the question by presenting clearly the nature of medieval kingship. This theory of kingship based on customs and statute, and on the consent of the people, fitted well with the Dominium Regale et Politicum of Sir John Fortescue. According to this theory the king could be absolute but not arbitrary; he was absolute in a limited sphere, but he was governed by the law which was as valid as his royal power. The king could not break the law and if he did he became the arbitrary and unjust king.



In general it can be said that modern scholars have followed McIlwain and Chrimes, but McIlwain and Chrimes have not introduced something peculiarly new. They clarified the past political theory and made Fortescue's ideas understandable.

However, many questions concerning Fortescue remain to be answered. The sources of his theory shall always be a controversial issue, even though the explanation of McIlwain and Chrimes seems quite solid. Fortescue himself wrote clearly, but the period in which he wrote was a very confused one and must be further studied if we are to understand him fully. The role of Parliament during the Lancastrian rule has never been fully explained and until it is many of the opinions of Fortescue will border on conjecture. Likewise, the role of the Lancastrian kings in political government is a problem that still confronts the historian. Therefore, Fortescue's theory and the general political conditions of the fifteenth century necessarily go hand in hand. To understand the one, we must know the other penetratingly. Then too, the De Natura Legis Naturae needs a modern translation, for the only one available is that found in Clermont's work of 1869

Sir John Fortescue appears a sound, sane man in a sea of confusion, writing fervently even in his last years about the ideas in which he seriously believed. He loved the law and the sound kingship it produced. He loved scholarship and the truth which it revealed. His epitaph, erected in 1677, might have been composed by him, for it reads:

Of him, who justice could best explain,  
This little urn does all that's left contain.  
His country's living law, that law's great light,  
The scourge of wrong, and the defense of right;  
His birth distinguished, merit gave him faith,  
Learning, applause, but virtue made him great.  
Through darkness now a carbuncle he shines,  
Nor wisdom's rays the gloomy cave confines;  
To later times shall Fortescue be known,  
And in the law's just praise be read his own. 169

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169 Clermont, I, 45-46.

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APPROVAL SHEET

The thesis submitted by Mr. Ronald Malecki has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

May 17, 1956  
Date

John A. Kemp  
Signature of Adviser